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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN EDWARD HAMM, Defendant and Appellant.	E063252 (Super.Ct.No. RIF1303813) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Annie Featherman Fraser and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Edward Hamm carjacked a stranger by attacking him with a shovel — indeed, defendant narrowly missed hitting him in the face with it. The bulk of

defendant's trial was devoted to a sanity phase. Five expert witnesses agreed that defendant suffered from paranoid schizophrenia. Four of the five concluded that, as a result, he did not understand the nature or the wrongfulness of his criminal acts; the fifth expert disagreed and concluded that he did understand. The jury found that defendant was not only guilty but legally sane.

In this appeal, defendant contends that the trial court erred by:

1. Overruling defendant's objection to evidence of his methamphetamine use and the effects of methamphetamine.

2. Denying defendant's motion to dismiss his strike priors in the interest of justice (*Romero*[1] motion).

We find no error. Hence, we will affirm.

I

PROCEDURAL BACKGROUND

In a guilt phase, the jury found defendant guilty of carjacking (Pen. Code, § 215, subd. (a)), with an enhancement for personal use of a deadly weapon (Pen. Code, § 12022, subds. (b)(1)-(2)). In a sanity phase, it found him legally sane.

In a bifurcated proceeding, after waiving a jury, defendant admitted three prior serious felony convictions as strike priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and also as enhancements (Pen. Code, § 667, subd. (a)). However, the trial court later

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[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

dismissed two of the three prior serious felony enhancements, because all three had been brought and tried together. The trial court also struck the deadly weapon enhancement.

Defendant was sentenced to a total of 30 years to life in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

II

FACTUAL BACKGROUND

A. *Guilt Phase Evidence*.

1. *The charged carjacking in 2013*.

On May 5, 2013, sometime after 3:30 a.m., Bradford Lucaci drove to the home of a friend in Corona and parked out in front. He was standing outside his car when defendant swung a shovel at his face.[2] He dodged, and the shovel missed him by inches.

Defendant said, "I'm going to cut your fucking head off." He was acting "wild" and "crazy." He kept swinging the shovel around. He also said, "Give me your keys." Lucaci tossed them to him. Lucaci said he was going to call the police. In response, defendant ordered him to throw his phone over a nearby wall. Lucaci said, "No. Fuck you." He then called the police. Before they arrived, however, defendant started the car and drove it away.

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[2] Lucaci testified at trial that he had already gotten out of the car when defendant came up behind him. However, he told the police and he testified at the preliminary hearing that defendant came out of a nearby house and told him to get out of the car; he complied.

Lucaci got his car back about 10 days later. It had been driven over 800 miles. It was "pretty beaten up" — the inside door handle did not work, the suspension was broken, "[a]nd it was leaking everywhere."

Defendant lived near the scene of the carjacking. The police went to his house; his sister identified the shovel. The next day, his family called the police and reported that he was back home. The police went to his house and arrested him.

2. *Prior carjackings in 2007.*

On February 15, 2007, after dark, defendant had attempted to carjack three cars on or near Main Street in Corona.

Kathryn Profitt was stopped at the exit from a parking lot, waiting to merge into the cross-traffic, when defendant "jumped out of the bushes." He had a "crazed-eye look," like Charles Manson. He was holding a two-by-four and a broken piece of cinderblock. He tried to open the driver's side door, but it was locked. He said, "Open the door or I'm going to bash your head in." She pulled out, despite the traffic, drove a short distance, and called 911.

Diana Asher was stopped at a red light when defendant started pounding on her passenger window with a brick. He was yelling. He looked "[v]ery wild and very crazy." She "sped through the red light," almost hitting another vehicle. She went half a mile, then stopped and called 911.

Andre Abella was stopped at a stop sign. Suddenly, defendant was pounding on his driver's side window with a rock or a brick. His "eyes looked kind of wild." He

opened the door and reached in. Abella "hit the gas" and drove away. He turned around to "find this guy or call the cops or something" and saw defendant being arrested.

Following these attempted carjackings, defendant "took a plea."

B. *Sanity Phase Evidence*.

1. *Non-expert testimony*.

In 2010, defendant had been diagnosed as having paranoid schizophrenia. Since then, he had been prescribed various antipsychotic medications.

Defendant's ex-girlfriend testified that he used methamphetamine "pretty much" the whole time they were together (i.e., from about 1996 through about 2000). Around 2010, defendant's behavior changed. He said he heard voices. She assumed that he was using methamphetamine again. After he started taking medication, he became calmer and slept more. Around the beginning of 2013, however, he started to claim that the Mexican Mafia was watching his house.

According to defendant's sister, at the time of the 2013 carjacking, defendant was not taking his medication regularly. He was saying that "psychics" were out to get him. He started carrying knives and other weapons. She saw methamphetamine paraphernalia "not too long before" his arrest.

When defendant was arrested in 2013, he was not tested for drugs or alcohol. He told the police that he committed the carjacking only because five members of the Vagos gang were all pointing guns at his head and he was in fear for his life.

When defendant was first jailed, he requested antipsychotic medication. Once it was prescribed, however, he refused to take it for about six months.

In June 2013, in a jailhouse phone call with his mother, defendant said his attorney was trying to "get [him] off on an insanity plea." He also said he was scheduled to see a doctor, and his attorney had told him to "speak freely" — "don't hang nothing back . . . sound[] as crazy as you want to."

In November 2013, defendant requested antipsychotic medication again, explaining, "We're going insanity."

In December 2013, in a jailhouse phone call with his father and his sister, defendant said he had talked to another psychiatrist, who "found me in fear for my life." He added, "So that's two now." "So like the third one, he'll ain't wanna go against the two." "I gotta see a couple more. But eventually I'll get off . . . ."

In February 2014, in a jailhouse phone call with his ex-girlfriend, defendant commented that, if he successfully pleaded insanity, he would go to a mental hospital for "from six months to a couple years." He added that his Social Security benefits would "probably go up to $1200 a month," so "I'll have a lot of money."

2. *Defense expert testimony*.

a. *Testimony of Dr. Assandri*.

In July 2013, Dr. Maurizio Assandri performed a psychological evaluation of defendant. At the time, defendant was refusing antipsychotic medication.

Dr. Assandri diagnosed defendant as having paranoid schizophrenia. Defendant said "[D]ead psychic people were fucking with him." He also said "he had parasites in his body that were trying to kill him."

In Dr. Assandri's opinion, at the time of the crime, defendant did not understand that what he was doing was morally wrong. Dr. Assandri did not think defendant was malingering, because defendant's records showed a consistent pattern of mental illness. However, he admitted that defendant appeared to be more rational and coherent when interacting with his family.

Dr. Assandri conceded that defendant's "bizarre behavior" when he was arrested could be the result of being under the influence of methamphetamine.

b. *Testimony of Dr. Rath.*

In January 2014, Dr. Craig Rath conducted a psychological evaluation of defendant. He diagnosed defendant as having paranoid schizophrenia; defendant's symptoms included delusions and hallucinations. In Dr. Rath's opinion, at the time of the crime, as a result of a paranoid delusion that people were out to get him, defendant did not understand the quality of his acts and lacked criminal intent. Dr. Rath found no evidence of malingering.

Defendant had a history of abusing drugs, including methamphetamine. According to Dr. Rath, "[i]ndividuals who use methamphetamine . . . may become paranoid because of prolonged sleep deprivation." Moreover, methamphetamine addiction can cause hallucinations and paranoia. However, Dr. Rath had no information indicating that defendant was under the influence at the time of the crime.

c. *Testimony of Dr. Kania*.

In April 2014, Dr. Michael Kania conducted a psychological evaluation of defendant. At that time, defendant was taking a "fairly high dosage" of an antipsychotic medication.

Dr. Kania agreed with the diagnosis of paranoid schizophrenia. Defendant told him that, in the days leading up to the carjacking, he was having trouble sleeping and he was hearing voices. He believed that gangs of "psychics" were threatening to harm him and to harm his family. Dr. Kania found no signs of malingering.

Dr. Kania testified, in hypothetical form, that defendant "[p]robably" was not able to distinguish right from wrong when he committed the crime because he was under the delusional belief that his life was in danger and he needed to escape.

Defendant admitted having used methamphetamine for about 30 years but claimed he quit in 2011. He told Dr. Kania that he was not using drugs at the time of the crime. According to defendant's jail admission assessment, he said he had last used methamphetamine within 60-90 days before his arrest. However, there were various inaccurate statements in the assessment.

Dr. Kania agreed that defendant's behavior in the carjacking "[c]ould . . . be consistent with someone that is under the influence of methamphetamine[.]" However, he had no information indicating that defendant was under the influence of methamphetamine at the time of the crime.

d. *Testimony of Dr. Jones*.

Dr. William Harley Jones had performed psychological evaluations of defendant twice — once in January 2008 and again in December 2014.

In 2008, Dr. Jones concluded that defendant had methamphetamine psychosis at the time of the 2007 carjackings. Defendant told Dr. Jones that he committed the 2007 carjackings because he was trying to escape from Vagos gang members who were trying to harm him and his family. Dr. Jones performed a test for malingering, which indicated that defendant was not malingering.

In 2014, Dr. Jones diagnosed defendant as having paranoid schizophrenia. He testified, in hypothetical form, that defendant was not able to distinguish right from wrong at the time of the charged 2013 carjacking. He did not see any evidence of malingering.

In 2007, defendant told the police that "he had used all sorts of methamphetamine[.]" Similarly, he told Dr. Jones that he had been using methamphetamine for about six days before the crimes and had not slept during this time. However, his blood was tested immediately after his 2007 arrest and was negative for methamphetamine and other drugs.

Defendant said he believed that most of his "thinking problems" resulted from drug use. When he used methamphetamine, his symptoms would "intensify ten times." Defendant's mother said, "Every time he uses narcotics, he becomes paranoid . . . ."

According to Dr. Jones, "some people who use [methamphetamine] in large amounts for long periods of time . . . have a psychotic reaction to the drug . . . ." This can

include hallucinations and delusions. Methamphetamine psychosis can last for many months after a person stops using methamphetamine. If a person already has paranoid schizophrenia, methamphetamine "almost always makes the symptoms worse."

3. *Prosecution expert testimony*.

In April 2014, Dr. Robert Suiter performed a psychological evaluation of defendant.

Defendant told Dr. Suiter that, as of the date of the crime, he had not slept for three days. He heard shots and screaming; he believed that his mother and sister had been killed. He got a shovel from the garage to use as a defensive weapon. As he was walking out of the garage, he saw a man getting into a car. He put down the shovel and asked the man for his car keys; the man gave them to him. Defendant drove the car to Arizona, slept in it, then drove it back to California. Once there, he phoned his home. His sister answered, and he realized that his belief that she had been killed was false.

Dr. Suiter agreed that defendant had paranoid schizophrenia. He testified, in hypothetical form, that at the time of the crime, defendant had symptoms of paranoid schizophrenia, but he realized that his actions were wrong. Dr. Suiter acknowledged, however, that if defendant really believed that people with guns were in his house trying to kill him, he may have felt that the carjacking was morally justified.

Dr. Suiter found two "red flags" indicating malingering. First, when defendant was evaluated in jail, a week after his arrest, he did not mention all of the delusions and hallucinations that he subsequently claimed. Second, defendant refused to see a psychiatrist for a medication evaluation and did not take medication for six months.

Defendant admitted using methamphetamine for approximately 30 years but claimed he had not used it for the last seven years.

III

EVIDENCE REGARDING METHAMPHETAMINE

Defendant contends that the prosecutor should not have been allowed to ask the expert witnesses about methamphetamine because there was no evidence that defendant was under the influence of methamphetamine at the time of the crime.

A. *Additional Factual and Procedural Background*.

Dr. Kania was the first expert witness to testify. On cross, the prosecutor established, without objection, that defendant told Dr. Kania that he had used methamphetamine until 2011. However, when the prosecutor asked, "Did he tell you how often he had been taking methamphetamines?," defense counsel said, "I'm going to object to this line of questioning on relevance grounds." The trial court ruled, "I'm going to allow it in subject to a motion to strike. I'll see where it's going."

The prosecutor then established that defendant told jail personnel that he had been using methamphetamine daily and had stopped only within the preceding 61 to 90 days.

After a break, outside the presence of the jury, the trial court overruled defense counsel's relevance objection.

As already mentioned (see part II, *ante*), the prosecutor went on to ask the other expert witnesses about defendant's methamphetamine use and about the effects of methamphetamine.

B. *Discussion.*

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "We review a trial court's relevance determination under the deferential abuse of discretion standard. [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 821.)

Defendant was legally insane if "he . . . was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25, subd. (b).) However, Penal Code section 29.8, as relevant here, provides: "In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of . . . an addiction to, or abuse of, intoxicating substances." Thus, even assuming that defendant was incapable of knowing or understanding the nature and quality of his act and incapable of distinguishing right from wrong, if that condition was due solely to methamphetamine abuse, then defendant was not legally insane.

At least in principle, then, defendant's methamphetamine use was relevant to the sanity phase. Defendant argues, however, that it was irrelevant because there was no evidence that he was under the influence of methamphetamine at the time of the 2013 carjacking.

Actually, however, there was such evidence. Defendant admitted having used methamphetamine for about 30 years. While he claimed to have quit, it would be hard to quit such a long-standing methamphetamine habit. Defendant's sister saw

methamphetamine paraphernalia in their home "not too long before" his arrest. After defendant committed the attempted carjacking in 2007, he told the police that he had been using methamphetamine and as a result he had not slept for six days. Similarly, defendant told Dr. Suiter that he had not slept for three days when he committed the 2013 carjacking. It was fairly inferable that he could not sleep due to methamphetamine.

Defendant's mother said that he became paranoid when he was using drugs. Defendant said himself that most of his "thinking problems" were due to drug use, and that his symptoms would "intensify ten times" when he used methamphetamine. Dr. Kania conceded that defendant's behavior during the 2013 carjacking "[c]ould . . . be consistent with someone that is under the influence of methamphetamine[.]" Dr. Assandri agreed that defendant's "bizarre behavior" when he was arrested in 2013 could be the result of being under the influence of methamphetamine.

In addition, defendant made inconsistent statements about exactly when he quit using methamphetamine. He told Dr. Suiter that he had not used for seven years. However, he told Dr. Kania that he quit in 2011. Moreover, he told jail personnel that he had used methamphetamine within 60-90 days before his arrest. From the fact that he lied, it was inferable that the truth contradicted his insanity defense. (Cf. *People v. Thomas* (1992) 2 Cal.4th 489, 515-516 [defendant's false statements were evidence of consciousness of guilt and therefore were evidence of guilt].)

Separately and alternatively, however, we do not agree that there had to be evidence that defendant was, in fact, under the influence of methamphetamine at the time of the crime. It would be enough that he had lingering methamphetamine psychosis. In

Dr. Jones's opinion, defendant had had methamphetamine psychosis in 2007. He also testified that methamphetamine psychosis can last for months after a person stops using methamphetamine. Thus, evidence of defendant's past methamphetamine use and the effects of methamphetamine was relevant to show that his delusions and hallucinations were due solely to methamphetamine.

IV

ROMERO MOTION

Defendant contends that the trial court erred by denying his *Romero* motion.

A. *Additional Factual Background*.

At the time of sentencing, defendant was 56 years old. His prior convictions included the following:

When defendant was a juvenile: Second degree burglary. (Pen. Code, § 459.) He was committed to the California Youth Authority.

February 1977: Trespass (Pen. Code, § 602) and disorderly conduct (Pen. Code, § 647). He was placed on probation, on terms including some jail time.

August 1977: Unlawful taking or driving of a vehicle. (Veh. Code, § 10851.) He was placed on probation, on terms including some jail time.

November 1979: Tampering with a vehicle. (Veh. Code, § 10852.) He was placed on probation.

May 1980: Brandishing. (Pen. Code, § 417.) He was sentenced to jail.

August 1980: Unlawful taking or driving of a vehicle. He was sentenced to prison.

April 1982: Burglary and nonforcible escape. (Pen. Code, § 4530, subd. (b).) He was sentenced to prison. He violated parole once.

November 1986: Burglary, unlawful taking or driving of a vehicle, and receiving stolen property (Pen. Code, § 496). He was sentenced to prison. He violated parole once.

November 1990: Possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) He was sentenced to jail.

November 1991: Possession of a controlled substance. He was sentenced to prison. He violated parole at least six times.

July 1997: Second degree burglary and being under the influence of a controlled substance. (Health & Saf. Code, § 11550, subd. (a).) He was placed on probation, on terms including some jail time.

August 1997: Possession of drug paraphernalia. (Health & Saf. Code, § 11364.) He was placed on probation. His probation was revoked once.

February 1999: Being under the influence of a controlled substance. He was placed on probation, on terms including some jail time.

August 2001: Battery. (Pen. Code, § 242.) He was placed on probation, on terms including some jail time.

August 2001: Driving under the influence. (Veh. Code, § 23152, subd. (b).) He was placed on probation, on terms including some jail time.

November 2001: Stalking. (Pen. Code, § 646.9, subd. (a).) He was placed on probation, on terms including some jail time. His probation was revoked twice.

March 2003: Burglary. He was placed on probation. His probation was revoked once.

March 2008: Three counts of attempted carjacking. (Pen. Code, §§ 215, subd. (a), 664.) He was sentenced to state prison. These were the prior carjackings in 2007 that were shown at trial. They were also the strike priors.

B. *Additional Procedural Background*.

Defendant filed a *Romero* motion. In it, he argued that the strike priors were all part of a single course of conduct. He also argued that the current carjacking was less serious than other carjackings, that he would still be subject to a fairly lengthy sentence, and that he committed the crime due to a mental illness that could be alleviated by medication.

The trial court denied the motion. It declined to view the strike priors as part of a single course of conduct, because defendant sought out additional victims and "made a conscious choice to have them be victims . . . ." It also found that defendant's "r[é]sumé of criminality" was "overwhelming." It noted that the current offense was violent. It concluded, "I see him as somebody who falls within the confines of the statutory intention of three strikes."

C. *Discussion*.

A trial court has discretion to dismiss a strike prior under Penal Code section 1385. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 529-530.) The focus of the analysis must be on "'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of

his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375.) "This standard is deferential. [Citations.] . . . [I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Here, the trial court's ruling was amply justified by defendant's extensive recidivism. His criminal history started when he was a juvenile and continued over nearly 40 years; it included five prison terms, as well as multiple violations of probation and parole. As the trial court noted, there were breaks in his criminal history "only . . .

when he's in state prisons or otherwise doing time and is away from society." Thus, the trial court could properly find that defendant was within the spirit of the three strikes law.

In the trial court, defendant relied on *People v. Vargas* (2014) 59 Cal.4th 635, which held that a trial court was required to grant a *Romero* motion when the defendant's two strike priors "were . . . committed during the same course of criminal conduct, . . . were based on the same act, [were] committed at the same time, [and were] against the same victim." (*Vargas* at p. 638; see also *id*. at pp. 641-649.) As defendant now more or less concedes, *Vargas*, by its terms, does not apply here. While the strike priors were all committed in a single evening, each of them involved a separate act committed at a separate time against a separate victim.

Defendant argues that he did not have a distinct opportunity to reform following each strike. *Vargas* stated: "The typical third-strike situation . . . involves a criminal offender who commits a qualifying felony after having been afforded two previous chances to reform his or her antisocial behavior . . . . [Citation.]" (*People v. Vargas*, *supra*, 59 Cal.4th at p. 638.) However, it went on to acknowledge that there are situations in which a defendant can properly be subjected to a three strikes term, even though he or she has not had two previous chances to reform. (*Ibid*.) Here, defendant's overall criminal history more than sufficiently demonstrates the necessary inability or unwillingness to reform.

Defendant also argues that the strike priors "did not result in any actual injuries . . . ." This is true only because his victims managed to escape; indeed, he was lucky that they were not hurt in traffic accidents when they did so.

Finally, the trial court did not have to view defendant's mental illness as mitigating. His criminality could not be ascribed solely to mental illness. There was no evidence that he had any mental illness before 2007; moreover, there was evidence that his mental illness was the result of long-term methamphetamine abuse. The jury essentially found that in 2013, despite his mental illness, defendant knew that his conduct was morally and legally wrong. Thus, the trial court could further find that he needed to be locked up for a very long time.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.